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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1951

No. 715

CALIFORNIA PAVING CO., a Partnership Composed of Angelo Bragato and Wm. D. Smith and BLOMQUIST OIL SERVICE, INC., a Corporation,
Petitioners,

vs.

L. C. SMITH and HILLTOP QUARRY, INC.,
Respondents.

BRIEF FOR RESPONDENTS.

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WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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vs.

L. C. SMITH and HILLTOP QUARRY, INC.,
Respondents.

BRIEF FOR RESPONDENTS.

The record does not bear out the petitioners' statement of facts relied on for reason that a writ should issue in this case involving the determination of a substantial and adverse claim to title to a leasehold estate on summary proceedings before a referee in bankruptcy.

INACCURACIES OF THE STATEMENT UPON WHICH THE PETITION IS BASED.

Petitioners, at page 3 of their petition, state that *"the quarry lease was acquired by the debtor with its money."* The record shows (R. 151, 153-154), and petitioners at page 5 of their petition concede, that the lessors (the Torpeys) of the quarry premises flatly refused to give the quarry lease to the debtor because of the existence of the arrangement proceeding. This was admitted by William Smith, partner of debtor, who had been negotiating with lessors. (R. 111, 129, 139.) It is uncontradicted in the record that no consideration whatever passed from the debtor or the partners composing the same to the lessors at the time the ten-year leasehold interest in the quarry was granted. The consideration for the lease was, and of necessity had to be, the undertaking of respondent L. C. Smith to pay rents and royalties as set forth in said lease (R. 120-126), which he alone signed and to whom the lessors can alone look under the lease for the rents and royalties.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED.

1. The petition is premised upon an erroneous statement of fact without support in the evidence, the findings of the referee, or the opinion of the District Court. Other inaccuracies are pointed out in the body of this brief.

2. It is settled by innumerable decisions of this Honorable Court that a bankruptcy court has no summary jurisdiction to determine title to property which was not in the actual or constructive possession of the bankrupt at the time the petition in bankruptcy was filed. The decision of the District Court merely applied that concept to the facts in the case at hand under and by virtue of the statutory mandate governing the jurisdiction, power and duties of the Bankruptcy Court in arrangement proceedings. § 312 of the Bankruptcy Act, Title 11 U.S.C., § 712(2).

3. The debtor and its creditor, petitioners here, are attempting to invoke the summary jurisdiction of the Bankruptcy Court to reach property which was never a part of the estate of bankruptcy or the subject of the debtor's trust.

QUESTION INVOLVED.

The sole question for determination is whether a referee has summary jurisdiction in an arrangement proceeding instituted under § 322 of the Bankruptcy Act, 11 U.S.C.A. § 722 (see Appendix "A" of this brief), to determine title to a leasehold estate which first came into existence more than three and one-half months after the petition for an arrangement was filed and more than a month after the order confirming said arrangement was entered and where the sole consideration for said lease was the undertaking of respondent L. C. Smith contained in said lease to pay rents and royalties. The jurisdictional question was

saved in the answer filed in the proceeding by respondents. (R. 28.)

ARGUMENT.

I.

THE TORPEY LEASE WAS NOT IN EXISTENCE AT THE TIME THE DEBTOR'S PETITION FOR AN ARRANGEMENT WAS FILED AND THE BANKRUPTCY COURT HAD NO JURISDICTION THEREFORE TO SUMMARILY DETERMINE TITLE THERETO.

It is settled that property coming to the bankrupt after filing of the petition in bankruptcy does not belong to the estate of bankruptcy and is not subject to the summary jurisdiction of the Bankruptcy Court. *Bank of California Nat'l Ass'n v. McBride* (9th Cir., 1943), 132 Fed. (2d) 769. In that case, at page 771, the rule is aptly stated as follows:

> "The court had summary jurisdiction in the premises if, when the bankruptcy petition was filed, the property was actually or constructively in the possession of the bankrupt; or if at that time possession was held by a person who made no adverse claim to the property, or whose adverse claim was determined on inquiry to be merely colorable. Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 44 S. Ct. 396, 68 L. Ed. 770; Harrison v. Chamberlin, 271 U.S. 191, 46 S. Ct. 467, 70 L. Ed. 897; Isaacs v Hobbs Tie & T. Co., 282 U.S. 734, 51 S. Ct. 270, 75 L. Ed. 645."

The foregoing criteria of summary jurisdiction in ordinary bankruptcy proceedings are embraced and

set forth as the standards of jurisdiction of the Court in arrangement proceedings by virtue of the Bankruptcy Act, § 312, Title 11 U.S.C.A. § 712(2), as follows:

> "Where not inconsistent with the provisions of this chapter, the *jurisdiction, powers, and duties of the court* shall be the same——
>
> * * * * * * *
>
> "(2) where a petition is filed under section 722 of this title as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed." (Emphasis ours.)

In *Collier on Bankruptcy,* 14th Ed., Vol. 8, p. 807, it is said:

> "The jurisdiction of the Bankruptcy Court is exercised partly in summary proceedings and partly in plenary suits. *The same principles which determine, where a trustee is involved, whether the court may proceed summarily or whether a plenary suit is necessary, are determinative where a debtor in possession is involved.* Where those principles establish summary jurisdiction, a debtor in possession may proceed summarily and need not resort to a plenary suit." (Emphasis ours.)

See, also, *Collier on Bankruptcy,* 14th Ed., Vol. 8, p. 124.

It follows in logical order that the reservation of jurisdiction in the plan of arrangement (R. 10) set

forth pursuant to § 357(7) of the Bankruptcy Act, 11 U.S.C. § 757(7), is merely a reservation of that jurisdiction specifically defined and delimited by § 312 of the Bankruptcy Act, Title 11 U.S.C., § 712(2) quoted supra.

If the Torpey lease was acquired after the petition for arrangement was filed and was not a gain or increment of property in the hands of debtor when the petition was filed, the Referee had no jurisdiction to summarily determine title thereto. *Wood v. Scott,* 187 F. (2d) 252; *Weiss v. Fleetwood Bank,* 26 N.Y. Supp. (2d) 583; *In re Retail Stores Delivery Corp.,* 5 Fed. Supp. 892; *In re Scranton Knitting Mills,* 23 Fed. Supp. 803.

That the Torpey lease came into existence more than three months after the petition for arrangement was filed is uncontradicted in the record (R. 120-126) and such was found as a fact by the Referee (R. 67-69, paragraphs three and four). Petitioners at page 13 of their brief impliedly concede this but labor the point that acquisition of the Torpey lease was part of the general scheme of operation of debtor's business pursuant to the plan of arrangement and, in effect, was a gain or proceeds of property possessed by the debtor at the time the petition for arrangement was filed. No such general scheme of acquisition is set forth in the plan of arrangement (R. 6-12), which itself was offered more than three and one-half months before the lease came into existence and which was confirmed (R. 14-16) five weeks before the lease came into existence. In the absence of a provision

in the plan of arrangement committing future property to the debtor's estate, the Bankruptcy Court has no jurisdiction over such property. *Miller v. Woolley* (9th Cir., 1944), 141 Fed. (2d) 837, 838-839. The Referee neither found that the acquisition of the Torpey lease was part of the general scheme of the debtor's business operation nor did he, by that legerdemain or otherwise, find that the Torpey lease was a gain or increment of assets in the hands of debtor at the time the petition for arrangement was filed. (R. 67-80.) Those findings are barren of any facts upon which summary jurisdiction could be based and, in themselves, actually negative the same. (R. 67-69, paragraphs 3, 4, 5.) *Heath v. Helmick* (9th Cir., 1949), 173 Fed. (2d) 157.

The debtor in this case had the burden of proving the facts supporting jurisdiction, in the absence of which the case would be dismissed. *Wuchner v. Goggin* (9th Cir., 1949), 175 Fed. (2d) 261; *Kelso v. Maclaren,* 122 Fed. (2d) 867; *In re Retail Stores Delivery Corp.,* 5 Fed. Supp. 892.

We again direct the attention of the Court to the fact that lessors flatly refused to give the lease to the debtor (R. 151, 153-154) because of the existence of the arrangement proceeding. That fact is conceded in petitioners' brief at page 5. This was admitted by William Smith, partner of debtor, who had been negotiating with lessors. (R. 111, 129, 130.) It is uncontradicted in the record that no consideration whatever passed from the debtor or the partners composing the same to the lessors at the time the ten-year

leasehold interest in the quarry was granted. The consideration for the lease was, and of necessity had to be, the undertakings of respondent L. C. Smith to pay rents and royalties as set forth in said lease (R. 120-126) which he alone signed and to whom the lessors can alone look under the lease for the rents and royalties. The Torpey lease was something new, separate and distinct from any property owned or possessed by debtor at the time the petition for arrangement was filed. It was an asset which came into being after petition filed and as a result of the pledged credit of respondent L. C. Smith. (R. 154.) The lease was, to paraphrase the language of *Weiss v. Fleetwood Bank,* supra: "after-acquired property brought through outside sources and by new credits." If debtor undertook to mine the quarry with the equipment comprising part of the arrangement estate, the Bankruptcy Court can summarily require him to account for the proceeds. *Weiss v. Fleetwood Bank,* supra. Such activity certainly cannot change the character of the leasehold estate which was "after-acquired property".

The case of *In re Austin,* 55 F. Supp. 462, so strongly relied on by petitioners, is misinterpreted by them. The *Austin* case is perfectly consistent with the ruling in *Miller v. Woolley,* supra, which is to the effect that the Bankruptcy Court has no power over future earnings of the debtor unless the plan of arrangement proposed by the debtor offers his salary to be earned in the future as part of the debtor's estate. It is apparent from the decision of

the Court in the *Austin* case that debtor pledged his future earnings as part of the plan of arrangement. The Court said at page 463:

> "Harry S. Austin was permitted by court order *on his own application* to use $1,000 out of fees then due and payable, or any fees coming into his hands after the filing of the petition, for living and office expenses." (Emphasis ours.)

II.

THE SUMMARY JURISDICTION OF THE BANKRUPTCY COURT IS THE SAME IN ARRANGEMENT PROCEEDINGS AS IN ORDINARY BANKRUPTCY.

Parts II and III of the brief of petitioners are devoted to argument that in arrangement proceedings "after-acquired" property of the debtor is subject to the summary jurisdiction of the Bankruptcy Court either (1) because the debtor takes such property as a trustee in bankruptcy, or (2) because of the claimed nature of arrangement proceedings. An analysis of the statutes involved will not support appellants' arguments.

(1) The Bankruptcy Act, § 342, Title 11 U.S.C.A. § 742, provides that a debtor in possession under an arrangement proceeding shall have "all the title and exercise all the powers of a trustee" appointed under the Bankruptcy Act. A trustee's rights relative to the property of a debtor in arrangement proceedings are defined in § 70a of the Bankruptcy Act, 11 U.S.C.A. § 110, which provides:

> "a. The trustee of the estate of a bankrupt, and his successor or successors if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt *as of the date of the filing* of the petition in bankruptcy or *of the original petition proposing an arrangement* or plan under this title * * *" (Emphasis ours.)

It is elementary that the trustee under § 70a, supra, acquires only property and interests belonging to the debtor at the time the petition is filed and "after-acquired property" is no part of the bankrupt estate. *Everett v. Judson,* 228 U.S. 474; *Bank of Nez Perce v. Pindel* (9th Cir., 1912), 193 Fed. 917, 924; *In re Leibowitt,* 93 Fed. (2d) 333. In an arrangement proceeding instituted under § 322 of the Bankruptcy Act, 11 U.S.C.A. § 722, the trustee takes title to the property of the debtor in existence as of the date the petition for arrangement was filed. *Lockhart v. Garden City Bank,* 116 Fed. (2d) 658; *Wood v. Scott,* 180 F. (2d) 252.

The title,* therefore, if any, which petitioner California Paving Company acquired in and to the Torpey lease, which came into existence on August 28, 1948 (more than three and one-half months after the petition for arrangement was filed) was held by

*William D. Smith, partner in debtor and petitioner California Paving Company, admitted both to attorney Francis P. Walsh and to attorney Daniel J. Creeden that California Paving Company had no interest in the quarry property but that the operator of the quarry rented California Paving Company equipment and paid California Paving Company so much a yard for loading the rock. (T.R. pp. 184-186.)

such appellant as a discharged debtor (11 U.S.C.A. § 741; Appendix "A") and not in its capacity as a trustee for debtor. In the case of *Wood v. Scott,* 180 Fed. (2d) 252, the Court reversed an order of the referee requiring an employer of debtor to deliver up wages and bonuses of debtor accrued as of the date the petition in bankruptcy was filed rather than the date the petition for an arrangement was filed. The Appellate Court held that such was unauthorized under 11 U.S.C.A. § 778(2). (Appendix "A".) The same limitation as contained in 11 U.S. C.A. § 778(2), in identical terms, is placed on the power of the Bankruptcy Court at the outset in an arrangement proceeding 11 U.S.C.A. § 712(2), quoted supra, p. 5. It follows in logical order that the decision in *Wood v. Scott,* supra, would have been the same even in the absence of subsequent bankruptcy.

The case of *Hollingsworth & Whitney Co. v. Boston,* 39 Am. B. R. 678, relied on by petitioners, did not involve "after-acquired" property but rather property transferred by the bankrupt within four months of bankruptcy, the proceeds of which were turned over to the trustee in bankruptcy under an agreement which, by the interpretation given to it by the Court, vested the Bankruptcy Court with jurisdiction.

(2) Petitioners assert that the opening clause common to 11 U.S.C.A. § 712, quoted supra, § 741 (Appendix "A"), and § 752 (Appendix "A"), namely, "Where not inconsistent with the provisions of this chapter," in some unexplained manner enlarges the jurisdiction of the Bankruptcy Court so as to em-

power it to deal summarily with "after-acquired property" in arrangement proceedings. Petitioners, however, fail to cite a single statute applicable to arrangement proceedings which enlarges the jurisdiction of the Court over that which it has in ordinary bankruptcy. So far as we have been able to ascertain, there is no such statute.

Courts of bankruptcy and their creature, the referee, are of statutory origin and possess only the jurisdiction and powers expressly or by necessary implication conferred by statute. *Gamble v. Daniel,* 39 Fed. (2d) 447, 452-3; *Chicago Bank of Commerce v. Carter,* 61 Fed. (2d) 986. Failure of such laws to provide authority to act in any particular contingency result, as said in the case of *In re Fox West Coast Theatres,* 25 Fed. Supp. 250, 264 (affirmed 88 Fed. (2d) 212; cert. den. 301 U.S. 710), in a "lacuna of jurisdiction". In the absence of a statute granting power to courts of bankruptcy to determine controversies involving "after-acquired property" of a debtor in arrangement proceedings, there is no "inconsistency" with ordinary bankruptcy proceedings whatever and the usual tests of the Bankruptcy Court's summary jurisdiction are applicable. In *Collier on Bankruptcy,* 14th Ed., page 124, it is said:

> "The provisions of Chapters I to VII which confer summary jurisdiction upon the Bankruptcy Court in cases where it has actual or constructive possession of the property are not inconsistent with the provisions of Chapter XI [arrangement proceedings] and hence are applicable in a proceeding under that chapter."

In the cases of *Lockhart v. Garden City Bank,* supra, and *Wood v. Scott,* supra, both of which involve arrangement proceedings, the Court applied the test of summary jurisdiction applicable in ordinary bankruptcy.

III.

WHERE A DEBTOR IN AN ARRANGEMENT PROCEEDING IS SUBSEQUENTLY ADJUDGED A BANKRUPT, THE TRUSTEE IN BANKRUPTCY TAKES TITLE TO THE PROPERTY OF THE DEBTOR AS OF THE DATE OF THE FILING OF THE ARRANGEMENT PROCEEDINGS.

It has been previously pointed out that under the statutory scheme for arrangement proceedings, the jurisdiction, powers and duties of the Court (11 U.S.C.A. § 712(2)), the powers and duties of the officers of the Court and of the debtor (11 U.S.C.A. § 741), and the rights, duties and liabilities of creditors and of all other persons (11 U.S.C.A. § 752) are the same in arrangement proceedings instituted under § 322 of the Bankruptcy Act (11 U.S.C.A. § 722) as that in ordinary bankruptcy after an adjudication has been entered.

If the debtor in arrangement proceedings instituted under § 322 of the Bankruptcy Act is subsequently thrown into bankruptcy for any reason *save fraud,* § 377 and § 378 of the Bankruptcy Act (11 U.S.C.A. § 777, § 778) are applicable and the trustee in bankruptcy takes *title to the property of the debtor in existence as of the date the petition for arrangement*

was filed. Miller v. Woolley, supra; ***Wood v. Scott,*** supra; *Lockhart v. Garden City Bank,* **supra.**

Section 378 of the Bankruptcy Act (11 U.S.C.A. § 778(2) is as follows:

> "Upon the entry of an order directing that bankruptcy be proceeded with——
>
> * * * * * * *
>
> (2) In the case of a petition filed under section 722 of this title, the proceedings shall be conducted, so far as possible, in the same manner and with like effect *as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this chapter was filed;* and the trustee nominated by creditors under this chapter shall be appointed by the court, or, if not so nominated or if the trustee so nominated fails to qualify within five days after notice to him of the entry of such order, a trustee shall be appointed as provided in section 72 of this title." (Emphasis ours.)

Section 70h of the Bankruptcy Act (11 U.S.C.A. § 110(h)), quoted in petitioners' brief, speaks of an arrangement being "set aside". The only statutory authority for "setting aside" an arrangement proceeding is *for fraud* under § 386(1) of the Bankruptcy Act, 11 U.S.C.A. § 786(1), and it is in that instance only that 70h of the Bankruptcy Act, supra, becomes applicable, vesting the trustee with title of the debtor "as of the date of the final decree setting aside the arrangement." *Collier on Bankruptcy,* 14th Ed., Vol. 8, p. 1461 et seq. By their very nature, the

provisions of § 70h, supra, of the Bankruptcy Act are an exception to the general rule enunciated by § 378 of the Bankruptcy Act, 11 U.S.C.A. § 778(2) quoted supra, and 70a of the Bankruptcy Act, 11 U.S.C.A. § 110a, quoted supra, and in effect are a penalty for the fraud of the debtor. There is no suggestion in this case that the debtor has practiced fraud in the procuring of the arrangement, and until the happening of that contingency the section is not applicable at all (*Collier on Bankruptcy,* 14th Ed., Vol. 8, p. 1460) and the Bankruptcy Court has no jurisdiction over "after-acquired property" such as that in question here. *Miller v. Woolley,* supra; *Wood v. Scott,* supra; *Lockhart v. Garden City Bank,* supra.

CONCLUSION.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Dated, San Francisco, California,
May 9, 1952.

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Attorney for Respondents.

JOHN E. LYNCH,
Of Counsel.

(Appendix A Follows.)

Appendix A

11 U.S.C.A. § 722:

"If no bankruptcy proceeding is pending, a debtor may file an original petition under this chapter with the court which would have jurisdiction of a petition for his adjudication."

11 U.S.C.A. § 741:

"Where not inconsistent with the provisions of this chapter, the powers and duties of the officers of the court and, subject to the approval of the court, their fees, and the rights, privileges, and duties of the debtor shall be the same, where a petition is filed under section 721 of this title and a decree of adjudication has not been entered in the pending bankruptcy proceeding, as if a decree of adjudication had been entered in such bankruptcy proceeding at the time the petition under this chapter was filed, or, where a petition is filed under section 722 of this title, as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed."

11 U.S.C.A. § 752:

"Where not inconsistent with the provisions of this chapter, the rights, duties, and liabilities of creditors and of all other persons with respect to the property of the debtor shall be the same, where a petition

is filed under section 721 of this title and a decree of adjudication has not been entered in the pending bankruptcy proceeding, as if a decree of adjudication had been entered in such bankruptcy proceeding at the time the petition under this chapter was filed, or, where a petition is filed under section 722 of this title, as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed."

11 U.S.C.A. § 778(2):

"Upon the entry of an order directing that bankruptcy be proceeded with——

* * * * * * *

(2) in the case of a petition filed under section 722 of this title, the proceeding shall be conducted, so far as possible, in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this chapter was filed; and the trustee nominated by creditors under this chapter shall be appointed by the court, or, if not so nominated or if the trustee so nominated fails to qualify within five days after notice to him of the entry of such order, a trustee shall be appointed as provided in section 72 of this title."